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In the Supreme Court of the United States

OCTOBER TERM, 1981

RAMAH-NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC., APPELLANTS

v.

BUREAU OF REVENUE OF NEW MEXICO

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a State may tax the gross receipts that a non-Indian construction contractor receives from a tribal school board for the construction of a school for Indian children on Navajo Reservation tribal trust lands, where the construction is part of a federal scheme for encouraging tribes to assume the governmental function of providing for the education of their children and where the State has relinquished the responsibility for educating the children who attend that school.

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In response to the Court's invitation of October 5, 1981, the United States filed a memorandum at the jurisdictional stage.

STATEMENT

1. Appellant Ramah-Navajo School Board, Inc. is a nonprofit corporation organized and operated by members of the Ramah-Navajo Chapter, a local government unit of the Navajo Indian Tribe on the Ramah-Navajo Reservation (J.S. App. 44). That area, the home of approximately 2,000 Navajos, is

located some 35 miles southeast of Gallup, New Mexico.[1] The Board was organized in 1970 with the purpose of developing educational programs for Navajo children (*id.* at 45; J.A. 128). As a "legally established organization of Indians" sanctioned by the governing body of the Navajo Tribe (J.A. 31-33, 47-48, 114-116), the School Board constitutes a tribal organization for purposes of 25 U.S.C. 450b(c), a definitional provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* (J.S. App. 45).

Ramah-Navajo children of high school age had attended a small public high school near the reservation until 1968, when the State closed the school (Tr. 52, 178). The School Board was organized to provide appropriate educational opportunities for the children at an accessible school near their homes (J.A. 112). In 1970, under a grant from the Bureau of Indian Affairs, it operated a school in make-shift local facilities; but in 1973, it entered into a contract with the BIA for the design of new school facilities (Tr. 188; J.S. App. 45). In the following year, the BIA contracted with the Board for the actual construction of such facilities (J.S. App. 45). Funding for the con-

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[1] The tribal trust and allotment lands, on which the Ramah-Navajo live are not within the main Navajo Reservation, but the courts and the parties have treated the area throughout as one enjoying full reservation status (see, *e.g.*, J.S. App. 54; J.A. 32; Appellee's Motion to Dismiss or Affirm 2). The Bureau of Indian Affairs has also treated it as a reservation, establishing a Ramah-Navajo Agency with its own superintendent to coordinate federal programs affecting the Ramah Chapter of the Navajo Tribe. Department of the Interior, *Departmental Manual* at 130 DM 10.2 (1981). Cf. *United States* v. *John*, 437 U.S. 634, 648-650 (1978).

struction was provided by a series of congressional appropriations enacted specifically for this school project (J.S. App. 45-46).[2]

The contracts between the BIA and the School Board designate the latter as the design and building contractor for the project (J.S. App. 46). The Board in turn invited bids by private firms for the actual construction of the facilities, which were to be built on tribal trust lands in the Ramah-Navajo Reservation leased to the School Board by the Navajo Tribe (*id.* at 46, 47). Only two firms bid on the project, and both included the projected cost of the New Mexico gross receipts tax (current version at N.M. Stat. Ann. § 7-9-1 *et seq.* (Repl. Pamph. 1980)) in their bids (J.S. App. 47). That tax is an excise tax imposed by the State "[f]or the privilege of engaging

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[2] Department of the Interior and Related Agencies Appropriation Act, 1974, Pub. L. No. 93-120, 87 Stat. 431; Supplemental Appropriations Act, 1974, Pub. L. No. 93-245, 87 Stat. 1073; Department of the Interior and Related Agencies Appropriation Act, 1975, Pub. L. No. 93-404, 88 Stat. 810; Department of the Interior and Related Agencies Appropriations Act, 1976, Pub. L. No. 94-165, 89 Stat. 985; and Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1978, Pub. L. No. 95-74, 91 Stat. 293.

The authority for the contracts, which were executed before passage of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, was the Johnson-O'Malley Act, 25 U.S.C. 452, which authorized the Secretary of the Interior to enter into contracts with, *inter alia*, states, political subdivisions, or appropriate private corporations, agencies, or institutions, for "the education * * * of Indians" and "to expend under such contracts, moneys appropriated by Congress for the education * * * of Indians" in the particular State in question. The appellant School Board states (J.S. 15 n.4) that it incorporated under the laws of New Mexico in the belief that this was a prerequisite of contract eligibility under the Johnson-O'Malley Act.

in business," and it is a fixed percentage of the total amount of money and other consideration a firm receives in exchange for goods and services it provides to customers in New Mexico. N.M. Stat. Ann. §§ 7-9-3.F and 7-9-4.A (Repl. Pamph. 1980).

The successful bidder was appellant Lembke Construction Co., Inc., a non-Indian corporation (J.S. App. 46-47). Under its contract with the BIA, the School Board was required to insert certain clauses as to audit, pricing and the like into its contract with Lembke and to submit the Lembke contract to BIA for its review (J.A. 122). Pursuant to its contract with the School Board, Lembke has paid all taxes demanded by the State with respect to the school construction project, including the gross receipts tax; and it was effectively compensated for those payments by the School Board's payment of a contract price that included the tax (J.S. App. 46-47, 50). Lembke worked at the construction site for more than five years, beginning in 1974 (Pltf. Exhs. 29-32). Some of the new facilities opened in 1975, and by the time of the trial of this case in 1979, the schools were serving some 450 Navajo students in kindergarten through the 12th grade (J.S. App. 49; Tr. 217).[3] Completion of all the planned facilities has not, however, been financially possible (J.A. 52-57, 65-66; Tr. 118-119).

2. Appellants protested the imposition of the gross receipts tax with respect to this Indian school construction project and, in 1979, after exhausting administrative remedies, filed the present tax refund suit against the appellee New Mexico Bureau of Revenue in the New Mexico District Court of the First Judicial District (J.S. App. 44; J.A. 21-28).

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[3] Thirty-five children attend a public high school at Zuni, New Mexico, beyond the Ramah Reservation (J.S. App. 49).

Lembke agreed to pay the School Board any rebated taxes it recovered in the action (J.S. App. 48). Following a trial, the court entered judgment in favor of the Bureau of Revenue, concluding that appellants were not entitled to a refund of the protested gross receipts tax payments, which amounted to $232,264.38 by the time judgment was entered (*id.* at 48, 53-55). The court rejected appellants' contentions that the tax was barred by federal preemption under the Supremacy Clause and was an impermissible infringement on tribal self-government (*id.* at 53-54). The court relied principally on its findings that the tax did not interfere with the School Board's operation of the school facilities and that the legal incidence of the tax was on the non-Indian construction contractor, Lembke, rather than on the School Board itself (*ibid.*).

3. On appeal by Lembke and the School Board, the Court of Appeals of the State of New Mexico affirmed (J.S. App. 27-34), relying on cases holding that "a non-Indian, such as Lembke, is not exempt from state taxation because the receipts taxed were derived from activity on Indian land" (*id.* at 29; citations omitted). The court further stated, with little elaboration, that "[t]he legal incidence of the tax is on Lembke, the tax does not interfere with tribal self-government, the tax is not a tax on the Indian tribe or tribal property and federal laws do not preempt the tax" (*id.* at 30). The court acknowledged that under the contract with Lembke "the ultimate economic burden" of the tax was on the School Board, but it found no intent revealed in the congressional appropriations for the project "to prohibit New Mexico from taxing the gross receipts of the non-Indian contractor who builds the school" (*id.* at 30-31).

Lembke and the School Board filed a motion for rehearing based on this Court's decisions in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Central Machinery Co.* v. *Arizona State Tax Commission*, 448 U.S. 160 (1980). The court of appeals denied the motion, stating simply that this case involved neither a "comprehensive or pervasive scheme of federal regulation" nor legislation "similar to the Indian trader statutes" (J.S. App. 36) and that its decision was supported by a footnote in *White Mountain Apache Tribe* stating: "'[T]he fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted" (J.S. App. 37, quoting 448 U.S. at 151 n.15).

On August 14, 1980, the New Mexico Supreme Court granted a petition for a writ of certiorari filed by appellants, but on March 30, 1981, it quashed the writ as improvidently issued (J.S. App. 38, 41).

SUMMARY OF ARGUMENT

A.

Under the principles applied in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), the gross receipts tax at issue in this case is an impermissible exercise of state jurisdiction. The construction of federally financed Indian schools on reservations under contracts between tribally sanctioned organizations and the Bureau of Indian Affairs is part of a detailed federal scheme for encouraging tribes to take on the important responsibility of educating Indian children and for ensuring that Indian children are offered educational opportunities sufficient for their needs. States may play a role in the scheme if they wish to enter into contracts to provide for the construction of educational facilities easily

accessible to reservation children, but here the State has relinquished any responsibility for educating the children who attend the school built by appellant Lembke for the Ramah School Board. Just as the timber regulations at issue in *White Mountain Apache Tribe* precluded the intrusion of the State tax burden (including a gross receipts tax) on a non-Indian company that contracted with the tribal timber enterprise to undertake the work of logging on the reservation, at least absent any showing that the State had a legitimate interest in the logging activities beyond its generalized desire for revenue, so the relevant statutes and regulations at issue in this case preclude the exaction of the gross receipts tax at issue here. It is imposed on an activity taking place on tribal trust lands that all parties have regarded as part of the Navajo reservation; the State has shown no particularized interest in that activity other than its interest in collecting money from the construction firm; and it is disruptive of the federal purpose of ensuring adequate educational facilities for Indian children.

B.

An alternative ground for deciding the case, which might end the necessity for unlimited case-by-case litigation of the question of States' authority over activities or transactions within Indian reservations, is the proposition that on-reservation activities involving a resident tribe are presumptively beyond the reach of State law, and that the burden is on the State to demonstrate that its intrusion into reservation affairs is either condoned by Congress or justified by a compelling need to protect legitimate State interests.

This approach is a logical consequence of the Court's recent restatement of the rule that the principle of

tribal sovereignty alone—without the aid of preemptive federal legislation—can erect "an independent barrier" to State intrusion into reservation affairs. *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 142. It also avoids the tension created by a focus on the pervasiveness of federal regulation as the principal barrier to State assertions of jurisdiction in a time when encouragement of tribal self-government is a primary federal policy.

Although tribal sovereignty—as the residuum of the aboriginal independence of the tribes, limited by their assumption of a dependent status vis-a-vis the United States—is, at its source, independent of federal law, some basis within the national statutory and constitutional framework must be found for its continued protection against a State's assertions of jurisdiction, which is normally complete over its territory and citizens subject only to the barriers imposed by the federal Constitution and federal law. We submit that this protection is fundamentally afforded by provisions of the Constitution, most significantly, the Indian Commerce Clause. That Clause, as its history reveals, is both the main source of congressional powers over white-Indian relations and a significant restraint on State jurisdiction over that intercourse. We would invoke the Clause only with respect to on-reservation intercourse that directly involves an Indian tribe and where the State has no real interest beyond a desire to increase its revenue. In the circumstances of this case, the Clause should provide a sufficient basis for invalidating, as an impermissible infringement on the interests it protects, the imposition of the State gross receipts tax on the payments made by a tribal organization to a contractor for building a reservation school.

ARGUMENT

A STATE MAY NOT TAX THE GROSS RECEIPTS THAT A NON-INDIAN CONTRACTOR RECEIVES FROM A TRIBAL SCHOOL BOARD FOR THE CONSTRUCTION OF A SCHOOL FOR INDIAN CHILDREN ON NAVAJO RESERVATION TRIBAL TRUST LANDS WHERE THE CONSTRUCTION IS PART OF A FEDERAL SCHEME FOR ENCOURAGING TRIBES TO ASSUME THE GOVERNMENTAL FUNCTION OF PROVIDING FOR THE EDUCATION OF THEIR CHILDREN AND WHERE THE STATE HAS RELINQUISHED RESPONSIBILITY FOR EDUCATING THE CHILDREN WHO ATTEND THAT SCHOOL

A.

1. In this case the Court must once again confront the problem of reconciling "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 165 (1973). The essential tools of analysis are readily at hand, however, in *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), a case that also concerned state taxation of the dealings of non-Indians with members of the Navajo Tribe, and in two recent decisions of the Court—*White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Central Machinery Co.* v. *Arizona State Tax Commission*, 448 U.S. 160 (1980) —which summarize the law developed by this Court on the subject of such taxation and which, in our view, dictate reversal of the judgment below.

In *Warren Trading Post*, the Court took note of the separate and quasi-independent status of the Navajo Tribe and of the historical fact that, long before a treaty established the Navajo reservation,

indeed, "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes." 380 U.S. at 686-687 (footnote omitted). See also *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886) (describing the "semi-independent position" of Indians who have "preserved their tribal relations"). Finding that an Arizona gross receipts tax on the income of a company that engaged in a retail trading business with Indians on the reservation intruded into an area that Congress had taken in hand through what are commonly known as the Indian trader statutes, 25 U.S.C. 261 *et seq.*, the Court in *Warren Trading Post* held the tax an impermissible interference with the congressional regulatory scheme. 380 U.S. at 688-691.

As the Court later explained in *McClanahan* v. *Arizona State Tax Commission*, *supra* (411 U.S. at 172), although cases such as *Warren Trading Post* concerned with the propriety of state regulation or taxation affecting Indians revealed a "trend * * * away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption[,]" the "Indian sovereignty doctrine is relevant" as "a backdrop against which the applicable treaties and federal statutes must be read." Thus, the *McClanahan* Court recognized as still fully in force the rule of *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), that a state law may be found invalid if it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them," although the rule did not itself resolve the

precise question in *McClanahan*. Accordingly, in *McClanahan* the Court read "the relevant treaty and statutes" with "this tradition of sovereignty in mind" (411 U.S. at 173), in reaching its conclusion that the State of Arizona had no jurisdiction to impose a personal income tax on a Navajo who lived on the reservation and derived her income from reservation sources.

From these and other cases the Court, in *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 142, discerned "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" (*id.* at 142-143; citations omitted):

> First, the exercise of such authority may be preempted by federal law. * * * Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). * * * The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress[, but] * * * traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 172, against which vague or ambiguous federal enactments must always be measured.

In *White Mountain Apache Tribe*, the Court, applying those general principles, held that a state motor carrier license tax (calculated as a percentage of gross receipts) and a use fuel tax could not be imposed

on a non-Indian logging company with respect to its activities on an Indian reservation under a contract with a tribal timber enterprise. Specifically, the Court noted (1) the existence of a detailed federal regulatory scheme governing the timber enterprise and maintenance of roads on the reservation (448 U.S. at 145-148), (2) the obstruction of that scheme through the imposition of a financial burden that would interfere both with the aim of ensuring that the timber profits "inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government" and with the discretion of the Secretary of the Interior to set appropriate fees and rates for the sale of timber (*id.* at 148-149), (3) the absence of any "legitimate regulatory interest [of the State] served by the taxes" other than "a general desire to raise revenue" (*id.* at 150), (4) the reservation situs of the activities to which the taxes were attributable, which implicated the "geographical component to tribal sovereignty" (*id.* at 151), and (5) the fact that "the economic burden of the asserted taxes will ultimately fall on the Tribe" (*ibid.*; footnote omitted).[4]

2. The principles invoked in *White Mountain Apache Tribe* and the factors singled out in its "particularized inquiry into the nature of the state, federal, and tribal interests at stake" (448 U.S. at 145), call for a like result in the present case. In a presidential message in 1970, President Nixon, noting

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[4] In the companion case, *Central Machinery Co.* v. *Arizona State Tax Commission, supra,* the Court held that under *Warren Trading Post Co.* v. *Arizona Tax Commission, supra,* the Indian trader statutes preempted the State's jurisdiction to tax the sale of farm machinery to an Indian tribe notwithstanding the company's failure to obtain a trader's license or its lack of a permanent place of business on the reservation.

problems with Indian education in federally operated schools and with the channeling of federal funds to serve the needs of Indian children in public schools, announced a policy of encouraging Indian tribes to "control [their] own Indian schools." 6 Weekly Comp. of Pres. Doc. 894, 899-900 (1970). The President referred to the beginnings of the Ramah-Navajo School Board's efforts to provide reservation educational facilities as one of several "notable examples of schools which have recently been brought under local Indian control." *Id.* at 899.

That policy of federal assistance to and encouragement of local Indian control of the education of reservation children subsequently was expressed in the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and, most specifically, in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* (hereinafter the "Self-Determination Act"). While acknowledging the historic federal responsibility for Indian education,[5] Congress

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[5] In Article VI of the Treaty Between the United States and the Navajo Tribe of Indians of June 1, 1868, 15 Stat. 669, the United States made specific promises to the Navajo respecting the education of their children:

> ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished,

nonetheless recognized the importance of fostering "parental and community control of the educational process" among "the Indian people." 25 U.S.C. 450 (b)(3). The Act accordingly provided for contracts with the Secretary of the Interior or his delegees similar to those which the BIA had entered into with the School Board respecting the congressional appropriations for the Ramah school facilities. 25 U.S.C. 450f. It also empowered the Secretary to promulgate appropriate regulations for achieving the purposes of the Act (25 U.S.C. 450k); and the Secretary has issued detailed regulations applicable to "school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations." 25 C.F.R. 274.1.[6]

3. These statutes and regulations do not, in all circumstances, oust the States from any role in the education of Indian children or the construction of schools for them. Indeed, the potential for State participation in the task was expressly recognized in the Johnson-O'Malley Act, 25 U.S.C. 452 *et seq.*, and that option was continued in the Self-Determination Act, which authorizes the Secretary to enter into con-

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who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

[6] The definitional section of the regulations makes it clear that the regulations apply to organizations such as the Ramah-Navajo School Board, which was operating a school for Indian children in make-shift facilities at the time of its application for a grant to construct new facilities. 25 C.F.R. 274.3(n). It is, of course, irrelevant that the Ramah-Navajo School is operated by a tribal organization rather than the Tribe itself. See *Central Machinery Co.* v. *Arizona State Tax Commission, supra*, 448 U.S. at 164 n.3.

tracts with any State education agency or school district for the purpose of, *inter alia*, assisting it in the construction of school facilities near Indian reservations to serve the reservation children. 25 U.S.C. 458. But where, as here, the State has not sought to assume that role, and an Indian organization has taken on the responsibility itself in partnership with the federal government, federal preemption follows under the principles applied in *White Mountain Apache Tribe* v. *Bracker*, *supra*.

First, the federal regulations governing school construction contracts between the Secretary (acting through the BIA) and tribes or tribally sanctioned organizations are comprehensive and provide for BIA review and monitoring of construction agreements (treated as subcontracts by the regulations) under which tribal groups pay federal funds to private construction firms for the actual design and building of school facilities. 25 C.F.R. Part 274.[7] For example, any Architect/Engineer agreement entered into by a tribal contractor must be approved by the BIA (25 C.F.R. 274.31), as well as all plans and specifications (25 C.F.R. 274.32(c)); all subcontracts must include Indian preference hiring provisions (25 C.F.R. 274.38(c)); and during the term of the tribal organization's contract with the BIA, the organization must maintain records to permit audits by the Secretary's representatives of,

[7] Although these regulations were issued after the formation of the contract between BIA and the School Board, they clearly empower the BIA to monitor the construction agreements with Lembke. And it is irrelevant whether the record shows actual monitoring by the BIA of the School Board's contractual relationship with Lembke, since it is the *existence* of federal regulatory authority rather than its actual exercise that preempts state jurisdiction. *Central Machinery Co.* v. *Arizona State Tax Commission*, *supra*, 448 U.S. at 165.

inter alia, any matter pertinent to any subcontract (25 C.F.R. 274.41(a)).

Second, the chief purpose of the Self-Determination Act and its implementing regulations is to ensure that Indian children enjoy "educational services and opportunities" adequate in "quantity and quality" to permit the children "to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 25 U.S.C. 450a(c). The State's exaction of a tax that, notwithstanding its formal imposition on the private contractor, depletes the funds provided for construction of an Indian-operated reservation school, obviously impedes this goal. That the relevant statutes and regulations do not expressly bar such a tax is no basis for finding the tax permissible. As this Court noted in rejecting a similar contention in *White Mountain Apache Tribe*, "[i]n a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject." 448 U.S. at 151 (citations omitted).

Third, the State has not identified any state interest in taxing the gross receipts attributable to the construction of the Ramah school buildings other than its desire to increase its general revenues. Its references to various state expenditures that might benefit the Ramah-Navajo (Appellees' Motion to Dismiss or Affirm at 6; Tr. 250-252, 267-311) do not suggest any specific connection to school construction on Indian lands; and New Mexico has not explained why it, unlike Arizona in *White Mountain Apache Tribe*, has jurisdiction to charge contractors for the privilege of doing business on what the State concedes is an Indian reservation. Of course, circumstances would be

different had the State shared the responsibility for constructing the school facilities in question or for providing for the education of the children who attend school there.

Finally, the decisions of the courts below assume that the school construction at issue here is an on-reservation activity, but they decline to accord any significance to that factor. This refusal to give any weight at all to the "significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry" (*White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 151), is plainly at odds with the precedents of this Court.

B.

We have made our submission that an application of the factors considered in *White Mountain Apache Tribe* and other cases involving state assertions of jurisdiction over reservation activities require the conclusion that the tax at issue here is impermissible. Although we believe that approach is fully sufficient to dispose of the present case, the Court may wish to consider a somewhat broader principle that compels the same result. We suggest it here because it is apparent that State courts and lower federal courts are not always able to discern the teaching of this Court's precedents when they turn on a "particularized inquiry," with few general guidelines. As one member of the Court has written, "a well-defined body of principles is essential to end the need for case-by-case litigation which has plagued this area of the law for a number of years." *Washington* v. *Confederated Tribes*, 447 U.S. 134, 176 (1980) (opinion of Rehnquist, J.). Without attempting to revive "[t]he conceptual clarity of Mr. Chief Jus-

tice Marshall's view in *Worcester* v. *Georgia*" (*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973)) or his "platonic notions of Indian sovereignty" (*McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973), it may yet be possible to articulate a more modest general rule for determining when State regulation or taxation of activities or transactions within an Indian reservation are permissible.

1. We suggest that the basic approach in respect of on-reservation activities involving the resident tribe must be that they are presumptively beyond the reach of State law, and that the burden is on the State to demonstrate that its intrusion into reservation affairs is either condoned by Congress or justified by a compelling need to protect legitimate State interests. We put to one side situations in which the tribe is not directly implicated—whether a crime where both offender and victim are non-Indians (*e.g.*, *United States* v. *McBratney*, 104 U.S. 621 (1882)), or property taxes are assessed against non-Indian property (*e.g.*, *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885)). So, also, we except cases in which the reservation situs is merely a pretext for avoiding State jurisdiction (*e.g.*, *Washington* v. *Confederated Tribes*, *supra*). But, when the tribe is an active partner in activities or transactions that occur within an Indian reservation and that are tied to the locale, the presumption, at least, ought to be that State regulation is out of bounds. And this principle, it seems to us, applies with equal force whether the State's interference is so tailored that the legal incidence of the burden falls on the tribe or its non-Indian contractor, the practical effect being the same. This is, indeed, the teaching of the seminal modern case, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), treating

it as "immaterial" to the ouster of State jurisdiction over an on-reservation sale that one party to the transaction was a non-Indian. See, also, *Warren Trading Post* v. *Arizona Tax Commission, supra; White Mountain Apache Tribe* v. *Bracker, supra; Central Machinery Co.* v. *Arizona State Tax Commission, supra.*

2. While the rationale has not always been clear, for the most part, the decisions striking down State taxation of on-reservation activities involving Indians rely on the pre-emptive force of treaties or statutes, read generously in light of the tradition of Indian sovereignty. Most recently, however, the Court has explicitly recognized that, in some circumstances, the principle of tribal sovereignty alone —without the aid of pre-emptive federal legislation— can erect "an independent barrier" to State intrusion into reservation affairs. *White Mountain Apache Tribe* v. *Bracker, supra,* 448 U.S. at 142. That approach, we submit, provides a clearer guide for decision of cases like the present one.

One obvious advantage of reliance on the Indian sovereignty doctrine is that a relatively uniform set of rules can be developed. Since the residual sovereignty of every Indian tribe is presumptively alike, and does not derive from federal delegation (see *United States* v. *Wheeler,* 435 U.S. 313 (1978)), it should no longer be necessary to eke out pre-emptive meaning in the particular provisions of disparate treaties, enabling acts, other federal statutes, or implementing regulations. So, also, stressing tribal sovereignty rather than federal preemption avoids the awkward tension created by the focus on the pervasiveness of federal regulations as the principal barrier to State assertions of jurisdiction in a day when the Political Branches are committed to en-

couraging tribal self-government, in part by loosening federal control of reservation affairs, and when the Court is repudiating the "federal instrumentality" doctrine as a shield against State interference. In our view, the "infringement" principle provides the firmer footing for recognizing both subsisting tribal sovereignty over its diminished territory and limited immunity from State regulation or taxation of reservation affairs involving the tribe.

3. There is, of course, no mystery about the source of tribal sovereignty: it is the residuum of the aboriginal independence of the tribes, limited by their assuming a dependent status vis-a-vis the United States and reduced in particular matters by subsequent Congressional action. See *United States* v. *Wheeler, supra,* 435 U.S. at 322-328; *Washington* v. *Confederated Tribes, supra,* 447 U.S. at 152-154. There is, accordingly, no need to identify any delegation of powers or grant of immunities in federal legislation. But the question remains how tribal sovereignty is protected against a State's assertions of jurisdiction, normally complete over its territory and its citizens, subject only to the barriers imposed by the federal Constitution or federal law.

One answer may be that federal recognition of Indian tribes and of their territory, whether by treaty or otherwise, impliedly insulates reservation affairs from undue State intrusions. For our part, however, we believe there is a *constitutional* barrier to State interference with tribal activities within their diminished territory, a barrier which Congress is free to lift in part or altogether, but which otherwise preserves a measure of tribal sovereignty over both members and defined territory. This, we believe, is reflected in the Treaty Clause, the Supremacy Clause, which "adopted and sanctioned the previous

treaties with Indian nations" (*Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)), and the exclusion of "Indians not taxed" residing within State boundaries from the population base used to apportion Representatives (Article I, Section 2, Clause 3; see, also, Amend. XIV, Section 2). But, especially in the present context, the most important constitutional text is the Indian Commerce Clause, which, as its history reveals, is both the primary source of Congressional power over white-Indian relations and an important restraint on State jurisdiction over that intercourse.

Before the Constitution, there had been much vying between the States and the national Congress over authority to deal with the Indian tribes. The matter was ambiguously compromised in the Articles of Confederation, which, in Article IX, granted Congress "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians," but then exempted Indians who were "members of any of the States" and purported to preserve "the legislative right of any State within its own limits." As Madison wrote in *The Federalist* No. 42, that was an "endeavor[] to accomplish impossibilities." He construed the new Indian Commerce Clause as resolving the dilemma by giving the national government exclusive authority over intercourse with the Indian tribes, whether within the States or elsewhere. *Ibid.* Although it was not always followed in practice, Madison's view, not surprisingly, has generally been accepted as sound constitutional doctrine.

Indeed, during the ensuing century, this Court expressly asserted that "there can be no divided authority" between federal and State governments in Indian affairs. *The Kansas Indians*, 72 U.S. (5

Wall.) 737, 755 (1867). And, after reviewing the history of the Indian Commerce Clause as intentionally altering the scheme of the Articles of Confederation, the Court concluded that "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes." *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). See, also, *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417-418 (1866).

In sum, the Indian Commerce Clause effectively "nationalizes" our relations with the Indian tribes. Not only is plenary power over that intercourse given to Congress; the States surrendered what prerogatives they previously claimed in this area, subject, of course, to any re-delegation of authority (see, *e.g.*, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979)). Hence, for instance, the "rudimentary proposition"—applicable even independently of the Non-Intercourse Acts—that Indian title can be extinguished only by federal consent and not by unauthorized State action. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974).

The Indian Commerce Clause assigns to the Nation, rather than the States, responsibility for Indian affairs, including the intercourse between Indians and non-Indians. It also confirms the dependent status of tribes vis-a-vis the United States. At the same time, however, that Clause—together with the other constitutional provisions already noted—impliedly recognizes the Indians living in tribal relations within their territories as separate sovereignties, protected against interference by all but the national government. As the Court has recently observed, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington* v. *Confederated Tribes*, *supra*, 447 U.S.

at 154. Thus, in both respects, the Indian Commerce Clause is a bar to State assertions of jurisdiction except by leave of Congress.

4. To be sure, history has blurred the line somewhat. As the Court has written, "[i]t can no longer seriously be argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Washington* v. *Confederated Tribes, supra*, 447 U.S. at 157 (citation omitted). But in the same decision the Court made clear that the Indian Commerce Clause has not been taken "entirely out of play in the field of state regulation of Indian affairs" (*id.* at 148). Accordingly, we deem it open to us to suggest that this unaltered constitutional text remains a significant impediment to State intrusion into reservation matters which do not implicate important State interests.

We do not attempt here to elaborate the present force of the Indian Commerce Clause. Suffice it to say that we invoke it only with respect to on-reservation intercourse which directly involves an Indian tribe and in circumstances where the State has no real interest—except only raising revenue. We do not construe that Clause as a bar to State regulation of non-Indians on non-Indian land within a reservation when their activities do not involve the tribe or significantly impinge on tribal interests. *E.g.*, *Montana* v. *United States*, 450 U.S. 544, 557-567 (1981). Nor do we assert that the Clause prevents the State from performing a role in Indian affairs, even Indian education, when Congress chooses to invite its participation and that invitation is taken up. Here, however, the State of New Mexico is not seeking to enter the Reservation through the door left open to it, but rather to breach the wall for wholly different

purposes. In our submission, the constitutional compact entered into between the original States, for themselves and all later States admitted on an equal footing, assigned to the National Government the sole prerogative to regulate commerce with the Indian tribes, unless and until Congress determined otherwise. That understanding, we suggest, governs this case.

CONCLUSION

The judgment of the Court of Appeals of the State of New Mexico should be reversed.

Respectfully submitted.

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